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No. 92-1277

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLINT NAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a station house inventory of the contents of petitioner's briefcase violated the Fourth Amendment.

2. Whether warrants authorizing subsequent searches of the briefcase and two residences were fruits of the portion of the station house inventory held invalid.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A12-A20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1992. A petition for rehearing was denied on October 22, 1992. The petition for a writ of certiorari was filed on January 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon his conditional plea of guilty, entered in the United States District Court for the District of Hawaii, petitioner was convicted on two counts of

bank burglary and one count of bank larceny, in violation of 18 U.S.C. 2113. He was sentenced to consecutive sentences of 20 years' and 51 months' imprisonment, to be followed by three years of supervised release, and was ordered to make restitution of $198,812. The court of appeals affirmed. Pet. App. A12-A20.

1. This case arose out of five burglaries involving automatic teller machines (ATMs) in Hawaii. The five burglaries were committed over a seven-year period, all but one during the Christmas shopping season. The first burglary took place on December 23, 1983, at a Honfed Bank branch. The burglar removed a padlock from the ATM money drawer, but was forced to flee before getting any money after police responded promptly to alarms. Gov't C.A. Br. 5.

The second burglary took place on December 14, 1984, at an ATM inside a Sears store. The burglar picked several locks to enter an enclosed service area behind the machine, opened the ATM, and took $91,700 in cash. The third burglary occurred on December 20, 1985, inside a clothing store at a shopping center. The burglar took $75,260 from an ATM. Three witnesses who saw the burglar enter and exit the ATM enclosure described him as a Japanese male with a light complexion, approximately 5'1" to 5'3" tall, and in his early thirties. Gov't C.A. Br. 5-6; Pet. App. A3.

The fourth ATM burglary took place on July 2, 1987. The burglar took $77,140 from an ATM inside another Honfed Bank branch. Although this burglary, unlike the others, did not occur during Christmas season, it was committed just before the Fourth of July weekend, when ATMs are also well stocked with holiday cash. A rust-colored Toyota station wagon

was observed parked behind the bank at the time of the burglary and was gone immediately afterwards. The last of the ATM burglaries took place on November 30, 1989. The burglar returned on that occasion to the same clothing store that was burglarized in 1985, opened the back of the ATM, and removed $138,190. Gov't C.A. Br. 6-7; Pet. App. A4.

2. In December 1989, Honfed Bank published a notice in the Honolulu newspapers offering a $25,000 reward for information about the ATM burglaries. Two sources came forward in mid-December in response to the notice. Both reported that petitioner was the likely perpetrator, described a similar burglary of a restaurant that he had committed, and related petitioner's efforts to obtain a pistol that he said he would use when he "pulled off his 'annual Christmas burglary.'" Gov't C.A. Br. 8. Petitioner matched the physical description that had been provided after the third burglary; he had a prior felony conviction for theft and a lengthy record of burglary arrests; and his car matched the description of the one believed to be involved in the fourth burglary. *Id.* at 8-9.

3. Petitioner was arrested for traffic offenses on January 30, 1990.[1] Hawaii Police Officer Jean Minic saw petitioner, who was accompanied by his girlfriend, Kil Soon Pelekai, run a red light while making a right turn. In addition, Minic noticed that peti-

[1] The following facts are drawn from the testimony of the police officers and FBI agents, whose testimony the district court found more credible than that of petitioner and his companion. Pet. App. A21-A22. The court of appeals relied on the district court's findings of fact. *Id.* at A15.

tioner was not wearing a seatbelt. Minic approached petitioner's car after he stopped it in a hotel turnaround. Another police officer, Calvin Tong, reached petitioner's car at about the same time. Minic approached the car and advised petitioner that he was being stopped for running a red light and driving without a seatbelt. Shining her flashlight into the car, she observed what appeared to be a revolver on the floor. She instructed petitioner to get out of the car, recovered the gun, and determined that it was a "starter gun" loaded with blanks. Minic noted that petitioner moved slowly in exiting the car, and Pelekai later told Minic that petitioner was on Valium. Petitioner was handcuffed and ordered to sit on the ground. Pet. App. A22-A23; Gov't C.A. Br. 10-11.

Asked for his driver's license and insurance and registration cards, petitioner stated that the car was not his, that he "did not have any of the paperwork," and that "[n]othing in the vehicle was his." A police radio dispatcher informed the officers, however, that petitioner in fact was the current registered owner of the car and that his driver's license had been suspended or revoked. Upon receiving that information, Minic told petitioner he was under arrest for making an illegal right turn, driving with a suspended license, failure to possess an insurance card, failure to wear a seat belt, and driving without a vehicle registration. Gov't C.A. Br. 11-12; Pet. App. A24-A25.

Petitioner asked that his briefcase be taken with him because he had a lot of money in it. Minic informed him that in order to transport the briefcase, the officers would have to inspect its contents to make sure there were no guns or explosives inside.

Petitioner gave the officers the combination to the briefcase locks, and Officer Tong looked inside, observing thousands of dollars in cash, a notebook, some unused money wrappers, and ATM envelopes. Gov't C.A. Br. 12-13; Pet. App. A24-A25; 4/26/90 Tr. 107.

When Officer Minic started to put the briefcase into a squad car, petitioner suggested that the money be given to Pelekai. A third police officer, Sergeant Albert Peterson, considered petitioner's request but determined that the proper procedure was to take the briefcase to the station house. In part because Pelekai's identity and relationship to petitioner were unknown, Peterson feared that the police department might be subjected to liability if Pelekai spent or absconded with the money. He advised petitioner that if Pelekai needed the briefcase, she could come to the station house and recover it in accordance with the usual procedures. Gov't C.A. Br. 12-13; Pet. App. A24-A25.

4. Petitioner was then taken to the police station and "booked" for the traffic offenses. Written procedures of the police department require that all "personal effects" of an arrested person, except his handkerchief and eyeglasses, be "inventoried and placed in a property bag which shall be placed in a depository for safe keeping." Gov't C.A. App. 29 & n.27. In accordance with those procedures and the police department's regular practice (4/30/90 Tr. 53), petitioner's briefcase was inventoried at the stationhouse by Officer Jesse Babauta. Babauta determined that there was $17,000 in cash in the briefcase along with the ATM envelopes observed at the scene of the arrest. There was also a notebook in the briefcase. To make sure that he had found all the cash and other

valuables or contraband in the briefcase, Babauta flipped through the pages of the notebook. He noticed a circled notation "IT" displayed prominently on one of the pages, which Babauta recognized as a symbol referring to a type of ATM. Babauta subsequently called an FBI agent and informed him that the police had arrested petitioner with $17,000 in cash, ATM envelopes, and a notebook reflecting the cash replenishment schedule of various ATMs. The FBI had suspected petitioner for some time, based on the information received in response to the bank's reward offer. Pet. App. A25-A26; Gov't C.A. Br. 13-15.

Based on the affidavit setting forth this information, the district court found probable cause to issue search warrants for petitioner's briefcase and the residences of Pelekai and petitioner's parents. Searches conducted pursuant to the warrants produced a wealth of evidence linking petitioner to the ATM burglaries, including the pistol described by the informants who came forward in response to the bank's reward offer. Two days later, agents obtained a third warrant to search part of Pelekai's residence that had previously been overlooked. The second search revealed $25,000 in cash bearing marks used to count currency loaded inside ATMs. Gov't C.A. Br. 15-16; Pet. App. A25-A26.

5. Petitioner filed a motion to suppress the evidence obtained through the search warrants, arguing that it was the fruit of two illegal searches of his briefcase, the first at the time of his arrest and the second at the station house when he was booked. The district court denied the motion. It held that the initial search was proper as incident to petitioner's arrest and that the subsequent station house inven-

tory was justified to safeguard petitioner's interest in protecting his property and to protect the police department against claims of theft and the possible presence of weapons or explosives. Pet. App. A34-A39. In addition, the court found that the affidavit submitted in support of the search warrants provided sufficient information independent of the earlier briefcase searches to satisfy the requirement of probable cause. *Id.* at A42-A43.

6. The court of appeals affirmed in an unpublished memorandum decision. Deferring to an express finding by the district court that the police officers' testimony was more credible than petitioner's, and rejecting the claim that petitioner was not arrested until after the briefcase was searched, the court of appeals held that the initial search was justified as incident to petitioner's arrest. Pet. App. A14-A16. The court also found that the arresting officers acted properly by taking the briefcase with petitioner to the station house. The court noted that petitioner initially asked the officers to take the briefcase to the station, and that "it was reasonable for the police to confiscate and inventory the contents of the briefcase in order to deter theft and false claims." *Id.* at A16-A17. Turning to the subsequent station house search, the court found it reasonable for Officer Babauta to count the money in the briefcase as part of an inventory search. *Id.* at A17-A18.

Although the court thought that Babauta's examination of the notebook was too searching to be justified as part of the inventory, it found that the warrants pursuant to which the briefcase and the residences of Pelekai and petitioner's parents were later searched would have been justified by the

supporting affidavit even if information obtained from the notebook were redacted. The court explained: "Each of the affidavits described the teller machine thefts and the large amounts of currency stolen in those thefts, summarized information implicating Nagano in the thefts from confidential informants considered reliable by the FBI, and described how the briefcase with $17,000 in cash had been recovered from Nagano during his arrest." Pet. App. A19.

ARGUMENT

Petitioner raises no question relating to his arrest or the officers' decision to bring his briefcase to the station. However, he argues that the station house inventory of the contents of his briefcase violated the Fourth Amendment. Furthermore, he argues that the illegal station house inventory tainted the warrants that the officers subsequently obtained.

1. a. According to petitioner, the opening of his briefcase for a station house inventory was not conducted pursuant to established procedures, as required by *Florida* v. *Wells*, 495 U.S. 1 (1990). In *Wells*, this Court upheld the suppression of evidence discovered in a closed container in the course of an inventory search of a car, because there was "no policy whatever with respect to the opening of closed containers encountered during an inventory search." 495 U.S. at 4-5. While rejecting the proposition that inventory searches must be "conducted in a totally mechanical 'all or nothing' fashion," the Court ruled that the opening of containers found during inventory searches must be guided by "standardized criteria * * * *or established routine*[.]" *Id.* at 4 (emphasis added).

In this case, unlike *Wells*, the evidence established that the inventory of petitioner's briefcase was performed in accordance with established routine. First, the relevant police department regulations provided that "[w]hen a person is arrested and he has personal property which he has claimed, they become the responsibility of the arresting officer; and the arresting officer has to take every precaution necessary to secure and make safe this person and his property." 4/30/90 Tr. 11. Accordingly, the officers properly took petitioner's briefcase to the station. Officer Babauta, who inventoried the briefcase at the station, described the standard procedure at that point: "When they first come in, * * * we ask them their name, what they're arrested for, and we note down the date and time they came in. * * * And then we open up the briefcase, or whatever item, the bag; and begin the inventory of all the items." *Id.* at 52-53.

Moreover, this case differs from *Wells* for another reason. The briefcase at issue here was not opened for the first time at the station pursuant to the inventory. Rather, the briefcase had already been opened, with petitioner's permission, at the scene of the arrest, and the officers had determined that it contained a large quantity of cash and ATM envelopes. Thus, the cash was not discovered at the station. Rather, the briefcase was opened at the station so that the police could determine just how much cash it contained, in order to avoid any claim that some of the cash had disappeared while it was in police custody. Indeed, under the facts of this case, it would have been negligent for the police not to inventory the contents of the briefcase, since they knew that it contained a significant amount of cash.

b. Petitioner also argues that the station house inventory was not conducted in accordance with appropriate "established procedures" because it violated the Hawaii Constitution as interpreted in *State* v. *Kaluna*, 520 P.2d 51 (Haw. 1974); *State* v. *Ching*, 678 P.2d 1088 (Haw. 1984); and *State* v. *Perham*, 814 P.2d 914 (Haw. 1991). In *Kaluna*, the Hawaii Supreme Court held that a folded piece of tissue paper in which four pills were wrapped should have been inventoried as a unit, without being opened. 520 P.2d at 54, 61-62. In *Perham*, the court applied *Kaluna* to invalidate an inventory search of the compartments of an arrested person's wallet. 814 P.2d at 915-916. Both decisions were based on the principle that "[t]o the extent that the basic purposes of an inventory search can be accomplished by means which are less intrusive on an internee's privacy, then the constitutional rule of reason requires such means to be employed." *Kaluna*, 520 P.2d at 61.

Far from supporting petitioner's argument, that principle distinguishes this case. Unlike the opening of the tissue paper and the wallet in *Kaluna* and *Perham*, the opening of an attache-type briefcase capable of concealing explosives or other dangerous items is necessary to protect the police from hidden dangers. As the district court found, "[t]he police were justified for their own protection to * * * conduct an inventory search for weapons or explosives contained within the case. The fact that the case had been reduced to police possession is no longer sufficient protection against the possibility of danger." Pet. App. A39. The other decision on which petitioner relies, *State* v. *Ching*, shows that the Hawaii Supreme Court would probably agree with the

federal courts' conclusion in this case. Although the Hawaii Supreme Court held in *Ching* that an officer should not have opened a small brass cylinder while conducting an inventory of lost property turned in to the police, the court distinguished inventories of items in the possession of an arrested person, noting that the police have a stronger interest under those circumstances in protecting themselves against dangers such as a hidden bomb. 678 P.2d at 1093. Thus, the Hawaii decisions on which petitioner relies show at most that his claim rests on an unresolved issue of state law.

2. The court of appeals correctly held that, even though the examination of his notebook during the station house inventory was unlawful, untainted information in the search warrant affidavit provided ample probable cause to justify the subsequent searches. See Pet. App. A19, quoting *United States* v. *Alexander*, 761 F.2d 1294, 1300 (9th Cir. 1985), and *James* v. *United States*, 418 F.2d 1150, 1151 (D.C. Cir. 1969).[2] Apart from the contents of petitioner's briefcase, the search warrant affidavit set forth a number of facts tying petitioner to the burglaries. Petitioner matched the description of the ATM burglar provided by three witnesses who saw a light-complected Japanese male, approximately 5'1" to 5'3" tall and in his early thirties, enter and exit the

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[2] Accord *United States* v. *Veillette*, 778 F.2d 899, 903-904 (1st Cir. 1985), cert. denied, 476 U.S. 1115 (1986); *United States* v. *Gillenwaters*, 890 F.2d 679, 681-682 (4th Cir. 1989); *United States* v. *Restrepo*, 966 F.2d 964, 970 (5th Cir. 1992), cert. denied, 113 S. Ct. 968 (1993); *United States* v. *Oakley*, 944 F.2d 384, 386 (7th Cir. 1991), cert. denied, 112 S. Ct. 1508 (1992).

clothing store ATM enclosure carrying a black tool bag on the day of the third burglary. Pet. App. A3, A6. Petitioner's car matched the "rust colored Toyota station wagon, four door, early 1980's" that was used in the fourth burglary. *Id.* at A3-A4, A7. Petitioner was identified as the ATM burglar by two sources who came forward in response to the bank's reward offer; both reported that he had used a similar modus operandi to burglarize a restaurant, and one added that petitioner had met with him and another person two weeks before the fifth burglary to procure a weapon for what he called his "annual Christmas burglary." *Id.* at A5-A6. Petitioner told FBI agents that he was a locksmith and that he lived at Pelekai's residence, one of the locations for which a search warrant issued; Pelekai stated that she did not know whether petitioner (her live-in boyfriend) was employed and also stated that he kept money at his father's house, the other location that was searched. *Id.* at A8-A9, ¶¶ 14-16. Without more, those facts plainly provided probable cause for the search warrants petitioner challenges.[3]

Petitioner is therefore mistaken in arguing (Pet. 25) that the stationhouse inventory of his briefcase

[3] Petitioner has altered the search warrant affidavit as presented in the appendix, underlining passages that he claims reflect information obtained as a direct result of the stationhouse inventory. See Pet. App. A7 n.*. Contrary to petitioner's characterization, however, the affidavit itself makes clear that most of the information petitioner has underlined was obtained otherwise. See, *e.g.*, *id.* at A7 ¶ 11 ("Hawaii state auto registration records showed that [petitioner] was the registered owner of 1983 Toyota station wagon, license DDA 079.").

was "crucial." Before that inventory occurred, the police had a wealth of information tying petitioner to the burglaries. Together with that information, the discovery of the cash and the ATM envelopes in his briefcase—which occurred at the scene of the arrest, not at the station (4/26/90 Tr. 107)—surely provided probable cause and ensured that the police would pursue an investigation of petitioner. Following *New York* v. *Belton*, 453 U.S. 454, 460 (1981), both courts below found the search at the scene of the arrest valid (Pet. App. A13-A16, A28-A35), and petitioner does not challenge it in this Court. Thus, the only information in the search warrant affidavit that was actually derived from the station house inventory is the observation of "IT" notations and notes on the replenishment schedules of various ATMs. The court of appeals therefore correctly found that that information did not affect the magistrate's probable cause determination. *Id.* at A19, A41.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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